IN THE

Supreme Court of the United States

OCTOBER TERM—1941

Nos. 819-820 ~~885~~ 20

IN THE MATTER OF
THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,
Debtor and Cross Petitioner.

FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the INSTITUTIONAL BONDHOLDERS COMMITTEE,
Petitioners,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, a corporation, *et al.*,
Respondents.

IN THE MATTER OF
THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,
Debtor and Cross Petitioner.

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under The Western Pacific Railroad Company First Mortgage dated June 26, 1916,
Petitioners,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, a corporation; THE WESTERN PACIFIC RAILROAD COMPANY, a corporation, *et al.*,
Respondents.

CROSS PETITION OF THE WESTERN PACIFIC RAILROAD COMPANY, THE DEBTOR, FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT FOR A LIMITED REVIEW OF ITS DECREE ENTERED NOVEMBER 28, 1941

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Dated, New York, N. Y., January 17, 1942.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Western Pacific Railroad Company, Cross-Petitioner (herein called the Debtor) respectfully asks that

the Petition of Frederick H. Ecker, John W. Stedman and Reeve Schley, constituting an Institutional Bondholders' Committee, and the Petition of Crocker First National Bank of San Francisco and Samuel Armstrong, as Trustees under the Debtor's First Mortgage dated June 26, 1916, bearing Docket Nos. 819 and 820, respectively, be denied as unwarranted by the usages of this Court and that this Court, pursuant to this Cross-Petition, issue a *writ of certiorari* to the Circuit Court of Appeals for the Ninth Circuit for a limited review of the Decree of that Court entered November 28, 1941.

The Debtor, for all purposes of this Cross-Petition, begs leave to refer to the certified transcript and additional printed copies of the record filed by the Institutional Bondholders' Committee with its petition for a writ of certiorari, and respectfully prays that such certified transcript and additional printed copies of the record be deemed to accompany this Cross-Petition, within the meaning of Rule 38 of this Court.

Our reasons may be briefly stated:

First, the reasons for a denial of the Petitions of the Institutional Bondholders' Committee and the Trustees of the Debtor's First Mortgage.

The somewhat elaborate Petitions filed by the Institutional Bondholders' Committee and the Trustees of the Debtor's First Mortgage are significant not for what they disclose but for what they omit. So, without attempting to tear apart the mosaic that these Petitioners have put together by the artful use of detached and deleted sentences from the Reports of the Interstate Commerce Commission, we shall, in the interest of brevity, go straight to the omissions.

The opinion of this Court in *Consolidated Rock Products Co., et al.* v. *Du Bois*, 312 U. S. 510, leaves no doubt in any reasonable mind that it was the duty of the Interstate Commerce Commission in the proceeding for the reorganization of the Debtor under Section 77 of the Bankruptcy Act to find and to certify to the District Court the value of the Debtor's property as an entirety in order to determine whether the Debtor was solvent or insolvent and, if solvent, the value of the equity represented by its capital stock and, if insolvent, the value, if any, of its unsecured debt and the value of the several secured claims; and (we here quote subsection (d) of said Section 77) "to state fully the reasons for its conclusions."

The Circuit Court of Appeals held (we think properly held) that "that duty was not performed" (Tr. 2671).

Assuming, as seems clearly to be the contention of the Petitioners in Nos. 819 and 820, that the bald statement in the Reports of the Interstate Commerce Commission that it finds the Debtor's unsecured debt and capital stock to be without value is the mathematical equivalent of a Finding that the value of the Debtor's entire estate is no greater than its secured debt at the effective date of the Plan—an assumption we deem highly controversial—it nevertheless was not a Finding within the requirements of this Court's opinion in the *Consolidated Rock Products* case "supported by requisite valuation data" that would place the Court in a position "to exercise the 'informed, independent judgment' which appraisal of the fairness of a plan of reorganization entails" because the Interstate Commerce Commission

(a) failed to disclose the factors to which it gave consideration;

(b) failed to disclose the weight which it gave to any one factor;

(c) failed to disclose (as counsel for the Appellants have insisted it was required by law to do) whether it treated earnings as the fundamental test of permissible capitalization and value;

(d) if it did exclude all other factors (as the record indicates must have been done) and based its conclusions *solely* on a capitalization of the Debtor's regulated earnings in a sub-normally depressed period, it failed to disclose either the precise period used or the interest rate at which such earnings were capitalized; and

(e) in any event, it failed to disclose the amount by which the value of the property was inadequate to satisfy in full the secured claims and the true value of each such claim.

In the absence of all this and much other vital information, it was manifestly impossible for the District Court or for the Circuit Court of Appeals to be judicially "satisfied" ("satisfied" is the imperative word used in subsection (e) of Section 77 of the Bankruptcy Act) that the Plan was fair and equitable and afforded due recognition to the rights of creditors and stockholders and otherwise complied with the law of the land.

Accordingly, no course was open to the Circuit Court of Appeals but to reverse the Order of the District Court so that the proceedings might be referred back to the Interstate Commerce Commission to be reconsidered in conformity with the law, and we respectfully submit that such would necessarily be the ultimate action taken by this Court should it issue the *writ of certiorari* asked by the Institutional Bondholders' Committee and the Trustees of

the Debtor's First Mortgage. Under these circumstances, no useful purpose could be served by the issuance of such *writ of certiorari* unless it be to enable this Court to write a new opinion to substitute for the very comprehensive and satisfactory opinion already written in the case of *Consolidated Rock Products Co., et al.* v. *Du Bois* (*supra*).

Second, the reasons for granting the Cross-Petition of the Debtor for a limited review of the decision of the Circuit Court of Appeals.

Notwithstanding that the Opinion and Decision of the Circuit Court of Appeals in all fundamental aspects are sound and salutary, we think the Court of Appeals overlooked paragraph (13) of subsection (c) of Section 77 when it dismissed the appeals taken from the Order of the District Court by the Debtor and by the Irving Trust Company. Each of these parties is named specifically in paragraph (13) among those that "shall have the right to be heard on *all* questions arising in the proceedings" (italics ours). The Debtor was the party which filed the original Petition for reorganization under Section 77 of the Bankruptcy Act and conducted the proceeding through the Interstate Commerce Commission, and in the performance of its duties under Section 77 it filed Objections to the Plan certified to the District Court by the Interstate Commerce Commission and appealed from the Order of the District Court overruling its Objections, its main contention being that the Plan was confiscatory in failing to give recognition to the equity represented by the Debtor's unsecured indebtedness and capital stock (Tr. 1648; 2667-2668, 2671). This fundamental contention was upheld by the Circuit Court of Appeals in connection with an appeal taken by The Western Pacific Railroad Corporation, holder of the Debtor's un-

secured debt and capital stock, which had intervened in the District Court to support the position taken by the Debtor (Tr. 1612, 1635). This action of the Circuit Court of Appeals seems quite at variance with the decision of the Circuit Court of Appeals in the Tenth Circuit cited below* and raises a serious question as to the status of the Debtor and of mortgage trustees in many other proceedings pending under Section 77 of the Bankruptcy Act. For that reason this Court may deem it proper to issue a *writ of certiorari* for the limited purpose of correcting the apparently inadvertent decision of the Circuit Court of Appeals on this minor issue and perhaps also may wish to clarify another feature of the opinion of the Court of Appeals as to which there may be ambiguity.

Referring to the basic objection that the Interstate Commerce Commission had improperly excluded the Debtor's stockholders and unsecured creditors from participation in the Plan, the Court of Appeals said:

> "• • • The objection states that the debtor is not insolvent, but has property of a value greatly in excess of its liabilities. Obviously, if the statement is true, the holding company is entitled to participate in the reorganization, and its exclusion there-

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* In the case of *Denver and Rio Grande Western Railroad Company* v. *McCarthy, et al.*, 111 F. (2d) 820, the Circuit Court of Appeals for the Tenth Circuit, in an opinion written by Circuit Judge PHILLIPS, said:

> "Undoubtedly, the debtor has important duties to perform in the reorganization proceedings, *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Railway*, 294 U. S. 648, 679, 55 S. Ct. 595, 79 L. Ed. 1110, and is entitled to the services of competent counsel to aid it in the performance of those duties and to have reasonable allowances made for the expenses incurred and the services rendered by such counsel, not only in connection with the formulation and presentation of the plan of the debtor but also in connection with the proceeding, the debtor having the right to be heard on all questions arising therein."

> from is unfair and inequitable. Thus, to determine the question raised by the holding company's objection, it was necessary to determine the value of the debtor's property as of the effective date of the plan—January 1, 1939" (Tr. 2668).

In view of this language, the question arises whether, when the case is referred back to the Interstate Commerce Commission, interests which would profit from a restricted valuation may urge the Commission to value the property of the Debtor *retroactively* at January 1, 1939, so as to exclude from consideration the favorable earnings experience of the property during the years 1939, 1940 and 1941 (Tr. 2635; 2656). To exclude these recent earnings, which not only demonstrate earning power greatly in excess of what reasonably might have been anticipated as of January 1, 1939, and which show that the earnings experience in prior years cannot be used as a "reliable criterion of future performance" and which, moreover, furnish a fair test and demonstration of the natural strength of important new mileage constructed too recently to be reflected in any average based on the Debtor's earning experience prior to January 1, 1939, would be grossly inequitable and unjust to the Debtor.

While it might be difficult to urge that such a retroactive valuation would be justified by the language quoted above from the opinion of the Circuit Court of Appeals and while it is at least doubtful whether the Interstate Commerce Commission would so proceed, nevertheless, as the question is a critical one from the Debtor's standpoint and the language may not be entirely free from doubt or ambiguity, this Court may find the matter of sufficient importance to justify the issuance of a *writ of certiorari* on the

Debtor's Cross-Petition filed only by way of abundant caution to avoid a possible claim that the Debtor had acquiesced in a retroactive valuation; which it does not. On the contrary, it insists that a retroactive valuation would be inadmissible. Subsection (e) of Section 77 expressly provides that the Interstate Commerce Commission upon reference back "shall proceed to a reconsideration of the proceedings under the provisions of subsection (d)" which can only mean that it shall proceed *de novo*.

It will soon be apparent to this Court that the great concentrations of capital as represented by the life insurance companies and the savings banks have reached an accord with the Interstate Commerce Commission in the various Section 77 proceedings whereby the equity interests represented by junior debt and capital stock are to be *theoretically* extinguished by drastic writing down of capitalization but in *reality* are to be transferred by allotments of new stock without par value to the holders of the senior debt.

The present case is typical.

The 19A Valuation is in excess of $150,000,000 (Tr. 1062). The original cost fully depreciated is in excess of $120,000,000 (Tr. 1044-1047; 1114). The secured debt permitted to participate in the reorganization amounted as of January 1, 1939, to only $87,712,654 (Tr. 1576). So, assuming the fair capitalizable value of the Debtor's property to be $120,000,000 (which was what was recommended in the dissenting opinion of Commissioner Miller and is a sum upon which more than 4% is being earned currently as shown by the supplemental tables in Volumes VII and VIII of the Transcript) there is an equity of $32,287,346

for the junior debt and capital stock, all of which would be transferred to the senior creditors under the Commission's Plan. Such facts cannot be concealed if the Interstate Commerce Commission is required to make and certify findings of value supported by adequate underlying data agreeably to the decision of this Court in *Consolidated Rock Products Co. et al.* v. *Du Bois* (*supra*). Naturally there will be a concerted drive (of which the present Petitions may be a part) to undermine that decision.

The Circuit Court of Appeals left undecided a very serious controversy involving conflicting lien claims in respect of more than $10,000,000 of property between the Trustees of the Debtor's First Mortgage and the Irving Trust Company, as Trustee of its Refunding and General Mortgage. These questions were fully argued in the Circuit Court of Appeals both orally and upon brief and being pure questions of law should, we submit, be determined before the Interstate Commerce Commission is asked to value the properties covered by the respective mortgages. A lay Board such as the Interstate Commerce Commission ought not to be required to guess how these lien questions ultimately will be decided by the Courts.

WHEREFORE, the Cross-Petitioner prays that the Petitions in Docket Nos. 819 and 820 be denied and that pursuant to this Cross-Petition a *writ of certiorari* issue to the United States Circuit Court of Appeals for the Ninth Circuit to the ends (a) that so much of the Decree of that Court dated November 28, 1941, as dismisses the appeal of The Western Pacific Railroad Company and the Irving Trust Company, as Trustee, be reversed and directed to be stricken from said Decree, and (b) that this Court may give

such directions as to the further course of this proceeding as to it may seem meet.

Respectfully submitted,

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